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No. 425

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

GROUP NO. 1 OIL CORPORATION, *Petitioner*,

v.

JAMES W. BASS, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES FOR THE FIRST DISTRICT OF TEXAS, *Respondent*

MOTION OF STATE OF TEXAS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

ROBERT LEE BOBBITT,
Attorney General of the State of Texas.

RICE M. TILLEY,
Assistant Attorney General.

R. D. COX, JR.,
Assistant Attorney General.

McBURNEY-YOUNG CO., HOUSTON

SUBJECT INDEX

	PAGE
Motion for Leave to File Brief as Amicus Curiae	1
Brief as Amicus Curiae	3-10
Preliminary Statement	3- 5
Argument:	
I. The present record in this case leaves all questions involved in doubt	5
II. The petitioner is not subject to the Federal income tax	6
III. The State of Texas did not by Section 27 waive these fundamental rights of its lessees	7
Conclusion	10

CASES CITED

	PAGE
Choctaw, Oklahoma & Gulf R'y Co. v. Harrison, 235 U. S. 292	6
Gillespie v. Oklahoma, 257 U. S. 501	2, 4, 6
Howard v. Gipsy Oil Company, 247 U. S. 503	6
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522	6
Jaybird Mining Company v. Weir, 271 U. S. 609	6
Large Oil Company v. Howard, 248 U. S. 549	6
Loan Association v. Topeka, 20 Wall. (87 U. S.) 655	9
M'Culloch v. Maryland, 4 Wheaton 316	6
The Collector v. Day, 11 Wall. (78 U. S.) 113	7
The Macallen Company v. Massachusetts, 279 U. S. 620	7
Weston v. City Council of Charleston, 2 Peters (27 U. S.) 449	9

TEXAS STATUTES

Act of April 9, 1913, Ch. 173, p. 409, 33rd Legislature	8
Act of March 16, 1917, Ch. 83, p. 158, 35th Legislature	4, 8
Act of March 10, 1925, Ch. 71, p. 225, 39th Legislature	4
Act of March 29, 1929, Ch. 282, p. 616, 41st Legislature	4, 6

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

May It Please the Court:

The undersigned, Attorney General of the State of Texas, respectfully moves this Honorable Court for leave to file on behalf of the State of Texas the accompanying brief in this case as *amicus curiae*.

ROBERT LEE BOBBITT,
Attorney General of the State of Texas.

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BRIEF OF STATE OF TEXAS AS AMICUS CURIAE

Preliminary Statement.

The State of Texas has followed closely the rapid progress of this case through the lower courts, and appreciates the splendid co-operation between counsel for the petitioner and the United States that has resulted in this test cast being presented to this court within less than a year after it was filed in the District Court. The State looked forward to an early decision by this court of the constitutional questions involved, as such a decision would vitally affect the entire leasing policy of the State in reference to its public lands. It confidently expected that this court would grant the petition for certiorari, as this is the first case of its kind before this court, and because of the apparently irreconcilable conflict between the decision of the Circuit Court of Appeals and that of this court in Gillespie v. Oklahoma,

257 U. S. 501, and the other cases arising from Oklahoma during the last sixteen years.

A brief consideration of the State's position will readily disclose its interest in having this court decide this case upon its merits, instead of merely denying the petition for a writ of certiorari.

The State's public domain is divided into different classes of land. Lands set aside for the University of Texas may be placed in one class, as their leasing is now governed by the Leasing Act of March 29, 1929, 41st Legislature, Ch. 282, set out at page XXXIX of petitioner's brief. The remaining public lands consist of those held for the benefit of the public schools, the State asylum, and other public lands held by the State for various purposes.

Mineral leases upon all of these classes of lands, except University lands, are still being made under the 1917 Act involved in this case, which has been brought forward in the Revised Statutes of 1925. The Solicitor General is therefore mistaken in his statement in his oposing brief that this case and the one referred to in the Federal Court of Pennsylvania are likely to be the only cases under this law. It applies to all leases of University land granted between 1917 and 1925 and to all leases heretofore and hereafter issued upon all other parts of the public domain.

It is axiomatic that if a bidder for a lease is definitely assured that his income will not be subject to the Federal income tax, he will offer to pay a larger amount for the lease and a larger royalty. If the record in this case stands as it is, future bidders for leases will not have this assurance with the result that the State will not receive the larger cash and royalty payments

it may be justly entitled to. As this court said in Gillespie v. Oklahoma, *supra*,

> "a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms for its wards,"

so will a tax upon the income of the State's lessees be a direct hamper upon the efforts of the State to make the best terms for itself.

The extent to which minerals exist in the State's lands is of course problematical. However applications for such leases are being continually made, and this will be the case for years to come. The State desires to obtain the greatest return possible from these leases as its primary purpose is the conversion of its own minerals into money and not the enrichment of the lessees. Because of this interest it especially desires a final ruling by the court upon the fundamental questions presented.

I.

The present record in this case leaves all questions involved in doubt.

The District Court held that the lessees under the 1917 Act are instrumentalities of the State and exempt from the income tax. The Circuit Court of Appeals did not pass upon that question but held under Section 27 the State has waived any such exemption that these lessees may have. The United States has opposed the petition for certiorari on the ground that the case involves only the interpretation of a local law and is not of sufficient importance for this court to consider. The denial of the application under these circumstances does not indicate whether this court concurs in the Circuit Court of

Appeals' construction of Secton 27, or whether it considers the petitioner is an instrumentality of the State or not.

As the United States has contested this petitioner's right to the claimed exemption regardless of Section 27, it is assumed it will oppose similar claims of lessees of University lands under the 1929 Act. Such future lessees will therefore not pay the larger royalties they otherwise would with the resulting loss to the State.

On the other hand a decision by this court on the merits will finally settle this difference between these lessees and the United States.

II.

The petitioner is not subject to the Federal income tax.

For over sixteen years this court has consistently held that oil and gas lessees of Indian lands in Oklahoma are agencies of the United States government, and as such agencies may not be taxed by the State of Oklahoma. Choctaw, Oklahoma & Gulf Railway Company v. Harrison, 235 U. S. 292 (1914); Indian Territory Illuminating Oil Company v. Oklahoma, 240 U. S. 522 (1915); Howard v. Gipsy Oil Company, 247 U. S. 503 (1918); Large Oil Company v. Howard, 248 U. S. 549 (1919); Gillespie v. Oklahoma, 257 U. S. 501 (1921); Jaybird Mining Company v. Weir, 271 U. S. 609 (1925). The exemption of governmental agencies from taxation by another government has become such an integral part of our constitutional law since M'Culloch v. Maryland, 4 Wheaton 316, that only by an amendment to the Constitution itself may this fundamental principle be changed or altered. It has been invoked by this court in numerous cases in recent years in which State taxes

have been held to be void. The vitality of the principle has been particularly emphasized in the recent case of The Macallen Company v. Massachusetts, 279 U. S. 620, in which this court reviewed its early decisions and reaffirmed them in all respects.

For over sixty years, since The Collector v. Day, 11 Wall. (78 U. S.) 113 (1870), the decisions of this court have held that the same reasons for exempting Federal agencies from State taxation require that the instrumentalities of the various States shall be equally freed from the burden of Federal taxation. In the sphere of its reserved activities the State of Texas as well as all other States of the Union is as independent of the general government as that government within its sphere is independent of the States. Not only is this true as a necessary corollary to the United States Constitution but, as to the public domain of this State, it has been expressly recognized in the treaty between the United States and the Republic of Texas, under which it became a State. By that treaty (petitioner's brief, page i) the United States expressly guaranteed the new State "shall also retain all its vacant and unappropriated lands * * * to be disposed of as said State may direct."

If lessees of the United States are above taxation by the States, the petitioner in this case may not be burdened by Federal taxation both under the implied provisions of the Constitution and under the express terms of the above mentioned treaty.

III.

The State of Texas did not by Section 27 waive these fundamental rights of its lessees.

The Circuit Court of Appeals has decided this case on the ground that by Section 27 of the 1917 Act that "Rights acquired under this Act shall be subject to taxation as is other property," the State of Texas waived the exemption from Federal taxation that its lessees might otherwise enjoy. The State of Texas submits that such a construction is erroneous, and it did not waive any of its rights. We will not discuss this section in detail as it has been thoroughly presented by petitioner in points D and E of its brief.

At the time this section was originally incorporated in the 1913 Leasing Act and brought forward in the 1917 Act, the oil companies were contending with the State that their leases were mere licenses to explore for oil, that as oil is a fugitive mineral neither they nor the lessors had any title or estate therein until it is reduced to possession, and therefore their leases created no estate or property rights subject to taxation. The purpose of this Section 27 was to insure that lessees on State lands would be required to pay the State and its counties and subdivisions taxes on these leases, regardless of how the Supreme Court of Texas might decide that litigation. With this clear purpose in view, any construction of this section that it embraced Federal taxation is clearly untenable.

If the Circuit Court of Appeals is correct, then the State of Texas has waived not only the rights of these lessees but valuable rights of the State itself. It must always be remembered that this constitutional exemption of governmental agencies has been read into the Constitution for the protection of the State and Federal governments from encroachments by the one upon the exercise of the powers of the other. The individual

welfare of the agency was not the reason for the origin of the rule. It was only because taxation of the agency tended to hinder it in the performance of its designated functions for the State that the rule was invoked. Therefore, to say that the State of Texas has waived the rights of its agency is to say that the State has waived its own rights.

This court has repeatedly stated that to allow one government to tax the instrumentalities of another government would be to allow it to retard, impede, hinder and ultimately to destroy such agency. The United States did in fact through taxation drive out of existence every State bank issuing notes for circulation. Loan Association v. Topeka, 20 Wall. (87 U. S.) 655, 663. Before the State will be held to have waived this freedom it enjoys from interference by the Federal government, there must be something more definite to this effect than the provisions of this Section 27.

This section applies only to University leases granted between 1917 and 1925, but not to such leases granted after 1925. It also applies to all leases on all State lands other than University lands. There is no plausible reason why the State should thus preserve its freedom from Federal control as to part of its lands, and yet place its other lands at the mercy of the United States, for as this court has said in numerous cases concerning the power to tax,

> "If the right to impose the tax exists, it is a right which in its nature acknowledges no limit," Weston v. City Council of Charleston, 2 Peters (27 U. S.) 449.

Under point D of petitioner's brief are cited many opinions of this court to the effect that one govern-

ment's agencies may not be taxed without its clear, express unequivocal consent. We will not repeat the references to those cases. Such consent cannot be found in any view that may be taken of Section 27, and it is respectfully submitted the Circuit Court of Appeals erred in its construction.

Conclusion.

It is believed the vital interest of the State of Texas in the present case will be readily apparent from the foregoing. The State is concerned not only with the manner in which the constitutional questions presented are ultimately decided but with their determination at as early a date as possible. Through the means of the present test case they may be conclusively determined. If the writ of certiorari is not granted, further litigation with its resulting consumption of the time of the courts and of the attorneys for the government will necessarily follow until this court finally passes upon the question.

In view of the importance of this case to the State of Texas, it respectfully requests that the petition for a writ of certiorari be granted and the case decided upon its merits.

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